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INTRODUCTION

Today we know much more about the effects of pretrial detention than we did even five years ago. Multiple empirical studies have emerged that shed new light on the far-reaching impacts of bail decisions made at the earliest stages of the criminal adjudication process.[1] This new evidence calls into question longstanding approaches to managing pretrial risk that provide limited due process protection and emphasize cash bail.

Making appropriate decisions about who to release pretrial and under what conditions requires an understanding of the impacts of particular bail requirements. For example, for a given defendant, how would their risk of failure to appear ("FTA") or future criminal activity change if they were subjected to condition *A* (which might include preventative detention) versus condition *B* (which might include an alternative to detention, such as text message reminders of scheduled court appearances)? Armed with such information, decisionmakers could appropriately balance society's dual interest in preserving public safety and holding the accused accountable with defendants' liberty interests. However, until recently, the actual evidence necessary to analyze the trade-off described above has been virtually nonexistent, leading judges and magistrates to rely on a combination of personal experience (possibly including conscious or unconscious bias), heuristics, and local norms in formulating their bail decisions.

One reason it has been so difficult to develop good evidence of the effects of pretrial detention is because the bail system, when operating as intended, sorts defendants in a manner that limits the value of the outcome data it produces for demonstrating whether and how bail conditions matter. In general,

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1. *See* discussion *infra* Part I.

because bail conditions are typically assigned based on perceived defendant risk, if we observe elevated violation rates for defendants with condition *A* versus condition *B*, it is difficult to determine empirically whether this reflects an adverse causal effect of condition *A* or simply the fact that those assigned condition *A* were different from those assigned condition *B* to begin with. For example, proponents of cash bail often cite low FTA rates among those released with assistance from commercial bonding agents and argue from such statistics that private bondsmen are a necessary component of the system to manage nonappearance risk.[2] However, comparing FTA rates for those with and without commercial sureties is misleading. To maximize profits, commercial operations have an incentive to accept only clients who are at low risk of nonappearance in the same way that an auto insurer would make money by identifying and then insuring only the safest drivers.[3] Thus, low FTA rates might simply reflect defendant sorting and tell policymakers little about commercial sureties' effectiveness.

The new generation of pretrial detention studies addresses this difficulty and provides a much stronger footing on which to base legal decisions and criminal justice policy. Recent studies improve upon past work in at least three respects. First, they make use of large administrative datasets, typically involving the near universe of criminal offenses within a particular jurisdiction, allowing researchers to describe the functioning of the criminal justice system as a whole rather than generalizing from a few specific incidents or cases. Second, they carefully consider the problem of differentiating correlation from causation, making use of natural experiments to measure the causal effects of detention and resolving the sorting problem described above. Finally, they consider a broader range of outcomes, focusing not just on the resolution of the case at hand, but on long-term ramifications, such as future criminal activity, earnings, and unemployment.

The takeaway from this new generation of studies is that pretrial detention has substantial downstream effects on both the operation of the criminal justice system and on defendants themselves, causally increasing the likelihood of a conviction, the severity of the sentence, and, in some jurisdictions, defendants' likelihood of future contact with the criminal justice system. Detention also reduces future employment and access to social safety nets. This growing evidence of pretrial detention's high costs should give impetus to reform efforts

2. *Pretrial Release of Felony Defendants in State Courts*, AM. BAIL COALITION, http://www.americanbailcoalition.org/Resources/Pretrial-Release-Of-Felony-Defendants-In-State-Courts/ [https://perma.cc/9G4E-R49V] ("Compared to release on recognizance, defendants on financial release were more likely to make all scheduled court appearances.").

3. *See, e.g.*, Liran Einav & Amy Finkelstein, *Selection in Insurance Markets: Theory and Empirics in Pictures*, 25 J. ECON. PERSP. 115, 115–16 (2011) (depicting the basic theory of selection in insurance markets and its implications for welfare and public policy).

that increase due process protections to ensure detention is limited to only those situations where it is truly necessary and identify alternatives to detention that can better promote court appearance and public safety.

I. RECENT STUDIES MEASURING THE EFFECTS OF PRETRIAL DETENTION

Dobbie, Goldin, and Yang offer a notable recent example from this new line of research.[4] The authors obtained administrative court records for Philadelphia and Miami-Dade counties covering the period from 2006 to 2014, ultimately resulting in an analysis sample of over 300,000 cases in Philadelphia and nearly 100,000 in Miami-Dade.[5] The court records provide information about bail, nonappearance, case outcomes, and future offending.[6] To these data, the researchers link individual-level IRS tax data, recording earnings and employment information. To obtain causal estimates, the researchers exploit the random assignment of bail magistrates to cases, empirically demonstrating that defendant and case characteristics are uncorrelated with judge assignment. But because judges vary in the leniency with which they apply bail guidelines, judge assignment influences the ultimate likelihood that individual defendants are detained pretrial.[7] This natural experiment furnishes an opportunity to measure outcomes for otherwise similar pools of defendants who vary in their access to pretrial release. Thus, as would be the case in a randomized clinical trial, the authors can measure the causal effect of pretrial detention.

Dobbie, Goldin, and Yang demonstrate that pretrial detention reduces the likelihood of FTA by sixteen percentage points, but that this improvement in appearance rates comes with substantial ancillary consequences.[8] Detention increases defendants' likelihood of pleading guilty from 33% to 44% (a 32% increase), and the reductions in rearrest that accrue from incapacitating defendants pretrial are completely offset by increases in post-trial offending.[9] As of three to four years post-adjudication, detention reduces the likelihood of employment from 47% to 38% (a 20% decrease) and reduces defendants' likelihood of accessing social safety net programs like the earned income tax credit.[10]

These findings are in keeping with several other recent studies of pretrial detention. For example, Gupta, Hansman, and Frenchman use data from

4. Will Dobbie, Jacob Goldin & Crystal S. Yang, *The Effects of Pretrial Detention on Conviction, Future Crime, and Employment: Evidence from Randomly Assigned Judges*, 108 AM. ECON. REV. 201, 201 (2018).

5. *Id.* at 210.

6. *Id.*

7. *Id.* at 217–19.

8. *Id.* at 224–30.

9. *Id.* at 212, 214, 224–25.

10. *Id.* at 212, 214, 227–30.

Pittsburgh and Philadelphia and also exploit the randomization of defendants to bail magistrates to measure the effects of a cash bail condition (as compared to release on recognizance or nonmonetary conditions) on outcomes.[11] They find that cash bail increases conviction likelihood from 50% to 56% (a 12% increase),[12] does not measurably reduce nonappearance (at least as captured by an imperfect proxy of bench warrants),[13] and increases future crime by 9%.[14] Also using data from Philadelphia, Stevenson shows that detention, in particular, increases the likelihood of conviction by 13%,[15] lengthens sentences by 42%,[16] and increases fees owed to the court (other than bail) by 41%.[17] Leslie and Pope confirm these patterns in a study of nearly one million criminal cases in New York City, demonstrating that detention increases the probability of conviction by 20% (thirteen percentage points) for felony cases and 11% (seven percentage points) for misdemeanor cases and more than doubles average incarceration sentence length.[18] The data also shows that a substantial fraction of the Black-White and Hispanic-White disparity in incarceration rates can be attributed to pretrial detention.[19] Turning to the federal system, Didwania demonstrates, using a sample of over 100,000 federal defendants, that detention substantially increases sentence length and reduces the likelihood that defendants receive substantial assistance[20] sentencing credits.[21]

All of these studies use the random assignment of bail magistrates to cases to address the sorting problem and measure causal effects. Heaton, Stevenson, and Mayson take a different approach by demonstrating—using a sample of nearly 400,000 misdemeanor cases in Harris County, Texas—that defendants arraigned on a day closer to the weekend are more likely to be released than those arraigned earlier in the week, despite being assigned identical bail amounts and appearing otherwise similar on observable characteristics.[22] These differences in detention plausibly result from the fact that obtaining release

11. Arpit Gupta, Christopher Hansman & Ethan Frenchman, *The Heavy Costs of High Bail: Evidence from Judge Randomization*, 45 J. LEGAL STUD. 471, 472 (2016).

12. *Id.* at 487.

13. *Id.* at 496–97.

14. *Id.* at 495.

15. Megan T. Stevenson, *Distortion of Justice: How the Inability To Pay Bail Affects Case Outcomes*, 34 J.L. ECON. & ORG. 511, 532 (2018).

16. *Id.* at 535.

17. *Id.* at 534.

18. Emily Leslie & Nolan G. Pope, *The Unintended Impact of Pretrial Detention on Case Outcomes: Evidence from New York City Arraignments*, 60 J.L. ECON. 529, 543, 547 (2017).

19. *Id.* at 551.

20. 18 U.S.C. § 3553(e) (2012); U.S. SENTENCING GUIDELINES MANUAL § 5K1.1 (U.S. SENTENCING COMM'N 2018).

21. Stephanie Holmes Didwania, The Immediate Consequences of Pretrial Detention 4 (June 3, 2019) (unpublished manuscript) (on file with the North Carolina Law Review).

22. Paul Heaton, Sandra Mayson & Megan Stevenson, *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 STAN. L. REV. 711, 756 (2017).

requires someone else to show up to post bail, which is logistically harder on weekdays due to scheduling and liquidity constraints. Such logistical challenges are likely unrelated to the underlying guilt or innocence of defendants but do affect how cases are ultimately resolved, as would be expected if pretrial detention causally impacts outcomes. In this study, detention is shown to increase the likelihood of pleading guilty from 53% to 66% (a 25% increase) and more than double sentence length.[23] While initially reducing crime through incapacitation, as of eighteen months post-hearing, detention increases felony offending by 30% and misdemeanor offending by 23%.[24] Misdemeanor cases present a particular problem for bail policy due to the possibility that pretrial detention can cause defendants to essentially accrue their entire expected sentence while awaiting trial, a situation which creates perverse incentives for innocent defendants to plead guilty to crimes that they did not commit to shorten their jail stay.[25]

To summarize, a robust collection of empirical studies using high-quality administrative data, spanning multiple jurisdictions and years, and encompassing different research designs provides consistent evidence that pretrial policies have important downstream consequences. Release conditions causally affect the guilt/innocence determination, sentence length, and the future economic prospects of defendants. Detention can also increase future crime, meaning that the prospect of incapacitation in the near term must be balanced against future crime in assessing whether regimes that act to detain truly protect or instead actually harm public safety.

II. STUDIES' IMPLICATIONS FOR PRETRIAL DETENTION SYSTEMS

These findings carry important implications for legal challenges to existing pretrial systems and their design more broadly. First, because the decision to detain will, in effect, be a decision to convict for some defendants, the process of determining who gets detained requires the robust procedural protections that apply in other phases of the criminal process.[26] For example, it is well established that the Sixth Amendment requires access to counsel in criminal cases where imprisonment is imposed,[27] but the "critical stage" analysis applied by the Supreme Court to preliminary stages of the adjudication process has yet

23. *Id.* at 747.

24. *Id.* at 718, 761–66.

25. *Id.* at 715–16, 784–86; *see also* Shima Baradaran Baughman, *Dividing Bail Reform*, 105 IOWA L. REV. (forthcoming Mar. 2020) (manuscript at 11, 16–17, 17 n.69) (on file with the North Carolina Law Review) (arguing that pretrial policy should operate differently depending on whether a defendant is accused of a misdemeanor or a felony).

26. *See* Caliste v. Cantrell, 329 F. Supp. 3d 296, 312 (E.D. La. 2018), *aff'd*, 937 F.3d 525 (5th Cir. 2019).

27. *See, e.g.*, Scott v. Illinois, 440 U.S. 367, 373–74 (1979); Argersinger v. Hamlin, 407 U.S. 25, 37–38 (1972); Gideon v. Wainwright, 372 U.S. 335, 342–43 (1963).

to be definitively extended to bail hearings.[28] Given the now-robust body of evidence showing that the outcome of the bail hearing, if detention, can have as its practical result the imposition of a jail sentence, it seems pertinent that the Sixth Amendment right to counsel should extend to such hearings.

Second, lack of individualization in bail procedures also raises concerns. Many jurisdictions continue to rely heavily on bail schedules that set presumptive bail amounts based on current charge severity and/or prior criminal history.[29] Such schedules, which do not take into account ability to pay,[30] will necessarily detain some fraction of criminal defendants, which will again have the practical effect of determining guilt for some. It seems obvious that an adjudication process that convicts defendants because they belong to a broadly defined group—without an individualized inquiry into their circumstances—would raise serious due process concerns. The pretrial process creates something close to such a system today in many communities.

Third, critics of existing bail procedures have also attacked them on equal protection grounds.[31] Several new-generation studies demonstrate that the burdens of pretrial detention are disproportionately borne by low-income individuals or minorities. Heaton, Mayson, and Stevenson, for example, show that, compared to defendants assigned identical cash bail amounts (who thus presumably represent the exact same degree of "risk" from the perspective of the court), defendants residing in the poorest 10% of zip codes are detained 1.6 times as often as those residing in the wealthiest 10% of zip codes.[32] Leslie and Pope demonstrate that the adverse causal effects of being detained pretrial are similar for Blacks, Hispanics, and Whites, but Black felony defendants are fourteen percentage points (roughly 45%) more likely to be detained than White defendants, and Hispanic felony defendants are nine percentage points (roughly 30%) more likely to be detained than White defendants.[33] Arnold, Dobbie, and Yang apply an outcomes test to bail decisions in Miami and Philadelphia to test for racial bias.[34] In essence, their test examines whether Black defendants experience bail failures at a lower rate than similarly situated White defendants, which should not occur if magistrates are optimizing their

28. *See* Rothgery v. Gillespie Cty., 554 U.S. 191, 212 (2008); Brewer v. Williams, 430 U.S. 387, 404 (1977); United States v. Wade, 388 U.S. 218, 236–37 (1967).

29. PRETRIAL JUSTICE INST., PRETRIAL JUSTICE IN AMERICA: A SURVEY OF COUNTY PRETRIAL RELEASE POLICIES, PRACTICES AND OUTCOMES 7 (2009), https://university.pretrial.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=bb5a2ba0-6c0a-eb4d-816a-3c8083e5e388&forceDialog=0 [https://perma.cc/22AN-L5CV] (indicating that, as of 2009, 64% of the most populous counties in the nation used bail schedules).

30. *Id.* at 6.

31. *See* ODonnell v. Harris Cty., 892 F.3d 147, 152 (5th Cir. 2018).

32. Heaton et al., *supra* note 22, at 741.

33. Leslie & Pope, *supra* note 20, at 550–51.

34. David Arnold, Will Dobbie & Crystal S. Yang, *Racial Bias in Bail Decisions*, 133 Q.J. ECON. 1885, 1888 (2018).

bail decisions absent racial discrimination.[35] They find that rearrest rates for White defendants at the margin of release—that is, those just above the threshold separating those who get released from those who are detained—are twenty-three percentage points higher than those for marginal Black defendants, a pattern strongly suggestive of racial bias against Blacks.[36]

As these studies demonstrate, pretrial detention disproportionately impacts racial minorities and the poor, meaning that these groups bear the brunt of higher conviction rates, longer sentences, and other adverse collateral consequences that flow from detention. The uneven application of pretrial detention has triggered constitutional equal protection challenges to cash bail systems in several jurisdictions.[37] Although litigation is ongoing, courts have indicated a willingness to invalidate pretrial detention regimes on equal protection grounds when there is strong evidence that they produce wealth-based discrimination in application.[38]

Defenders of the status quo contend that the large volume of cases flowing through the criminal justice system necessitates shortcuts such as bail schedules, uncounseled hearings, or reliance on private bail enforcement; without such shortcuts, they argue, the pretrial process would become intolerably protracted or costly.[39] Under this view, pretrial process simplifications serve to get defendants to pretrial release more quickly and thus actually mitigate the harms of pretrial detention. However, the close—indeed causal—relationship between detention and conviction demonstrated in recent research renders this view problematic. Few would argue that abrogating constitutional protections, such

35. *See id.*

36. *Id.* To understand why this suggests bias, notice that, by definition, for those on the margin of being released, a decisionmaker should be roughly indifferent as to whether they are released or detained. Absent any discrimination, this indifference should imply that the decisionmaker could detain one additional White defendant and release one additional Black defendant without any loss of utility. Doing so would have the benefit of reducing the rearrest rate because the marginal Black defendant has a lower rearrest rate than the marginal White defendant. The fact that decisionmakers do not make this seemingly efficiency-enhancing exchange suggests that the utilities are not balanced as would be the case if the decisionmakers were racially neutral.

37. *See* Alexander Bunin, *The Demise of Money Bail*, CRIM. JUST., Fall 2018, at 11, 12.

38. *See* ODonnell v. Harris Cty., 892 F.3d 147, 163 (5th Cir. 2018) ("In sum, the essence of the district court's equal protection analysis can be boiled down to the following: take two misdemeanor arrestees who are identical in every way—same charge, same criminal backgrounds, same circumstances, etc.—except that one is wealthy and one is indigent. Applying the County's current custom and practice, with their lack of individualized assessment and mechanical application of the secured bail schedule, both arrestees would almost certainly receive identical secured bail amounts. One arrestee is able to post bond, and the other is not. As a result, the wealthy arrestee is less likely to plead guilty, more likely to receive a shorter sentence or be acquitted, and less likely to bear the social costs of incarceration. The poor arrestee, by contrast, must bear the brunt of all of these, simply because he has less money than his wealthy counterpart. The district court held that this state of affairs violates the equal protection clause, and we agree.").

39. *Effectiveness and Cost*, AM. BAIL COALITION, http://ambailcoalition.org/effectiveness-and-cost/ [https://perma.cc/WKX8-QHB6].

as confrontation of witnesses or the reasonable doubt standard, would be an appropriate way to address the crush of high criminal caseloads, even if doing so would help some innocent defendants escape the criminal process sooner. Such protections are viewed as essential to ensure the integrity of the guilt/innocence determination. Jettisoning constitutional protections in the pretrial context, we now know, raises similar concerns because of the close connection between what happens in the bail hearing and the verdict that will ultimately be recorded.

What other lessons does this new raft of empirical research hold for those attempting to improve current practices? Empirical data shows more definitively than ever that pretrial detention carries high costs—not simply in terms of the fiscal burdens associated with housing people during their term of pretrial custody, although these are considerable,[40] but also through increases in wrongful convictions, augmented future criminal activity, and impairment of defendants' future economic outcomes.[41] While ensuring court appearance is a legitimate policy objective, in light of these high costs, pretrial detention should only be a final resort used sparingly and only after other less costly alternatives prove ineffective. A corollary is that investments that reduce reliance on pretrial detention—by, for example, diverting some defendants away from the criminal justice system toward social services,[42] improving the information available to decisionmakers at the initial bail hearing,[43] or providing supportive services to enable defendants to make it to court[44]—may generate net savings even if they

40. *See* Shima Baradaran Baughman, *Costs of Pretrial Detention*, 97 B.U. L. REV. 1, 6–7 (2017); Bernadette Rabuy, *Pretrial Detention Costs $13.6 Billion Each Year*, PRISON POL'Y INITIATIVE (Feb. 7, 2017), https://www.prisonpolicy.org/blog/2017/02/07/pretrial_cost/ [https://perma.cc/3SVC-2NFN].

41. *See supra* Part I.

42. An example of a promising practice in this area is Law Enforcement Assisted Diversion ("LEAD"). *See* KATHERINE BECKETT, LAW, SOC'YS & JUSTICE PROGRAM & DEP'T OF SOCIOLOGY, UNIV. OF WASH., SEATTLE'S LAW ENFORCEMENT ASSISTED DIVERSION PROGRAM: LESSONS LEARNED FROM THE FIRST TWO YEARS 3, 17, 41–46 (2014), https://www.fordfound.org/media/2543/2014-lead-process-evaluation.pdf [https://perma.cc/4BCK-E3FB]; *see also* Susan E. Collins, Heather S. Lonczak & Seema L. Clifasefi, *Seattle's Law Enforcement Assisted Diversion (LEAD): Program Effects on Recidivism Outcomes*, 64 EVALUATION & PROGRAM PLAN. 49, 49–50, 52–53, 55 (2017).

43. PRETRIAL JUSTICE INST., PRETRIAL RISK ASSESSMENT: SCIENCE PROVIDES GUIDANCE ON ASSESSING DEFENDANTS 5–6 (2015), https://www.ncsc.org/~/media/Microsites/Files/PJCC/Pretrial%20risk%20assessment%20science%20provides%20guidance%20on%20assessing%20defendants.ashx [https://perma.cc/2B5Q-D2V8].

44. *See, e.g.*, BRICE COOKE ET AL., UNIV. OF CHI. CRIME LAB & IDEAS42, USING BEHAVIORAL SCIENCE TO IMPROVE CRIMINAL JUSTICE OUTCOMES: PREVENTING FAILURES TO APPEAR IN COURT 16–18 (2018), https://urbanlabs.uchicago.edu/attachments/3b31252760b28d3b44ad1a8d964d0f1e9128af34/store/9c86b123e3b00a5da58318f438a6e787dd01d66d0efad54d66aa232a6473/I42-954_NYCSummonsPaper_Final_Mar2018.pdf [https://perma.cc/NDX4-2XC9] (court reminders via text message); Rochelle Olson, *Who Says There's No Free Ride? Grant Will Get Public Defender Clients to Court*, STAR TRIB. (Minneapolis Oct. 31, 2018, 7:38 PM), http://www.startribune.com/who-says-there-s-no-free-ride-grant-will-get-public-defender-clients-to-court/499213381/ [https://perma.cc/46LQ-4S2L].

require appreciable upfront investments to establish or continuing funding to operate.[45] The growing, high-quality evidence showing that pretrial detention reaches further and costs more than was previously recognized should stoke new urgency in efforts to ensure that "liberty is the norm, and detention prior to trial or without trial is the carefully limited exception."[46]

45. *See* Heaton et al., *supra* note 22, at 787 (noting that Harris County, Texas, could have averted $20 million in supervision costs by releasing criminal defendants who were detained pretrial and would have otherwise been releasable after paying $50).

46. United States v. Salerno, 481 U.S. 739, 755 (1987).